

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SAFECO INSURANCE COMPANY)	
OF ILLINOIS,)	No. 64042-9-I
)	
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
KEN BURETTA and CAROL)	
BURETTA, husband and wife,)	
)	
Defendants,)	
)	
BRIAN P. RUSSELL, an individual,)	
)	
Appellants.)	FILED: April 26, 2010

Spearman, J. – Safeco Insurance Company of Illinois (Safeco) filed this action in King County District Court and named Brian Russell as one of the defendants. The district court found the complaint frivolous as to Russell, dismissed him as a defendant, and awarded attorney fees. Safeco sought review in superior court, but eventually voluntarily dismissed its appeal. Russell now seeks review of the superior court's denial of his motion for an award of attorney fees for a frivolous appeal. But because it was entered on appeal from a court of limited jurisdiction, the superior court's ruling is not appealable as a matter of right. Nor does the superior court's decision satisfy the criteria for discretionary review. We therefore dismiss Russell's appeal.

FACTS

On May 27, 2008, Safeco filed a complaint in King County District Court alleging that it had paid its insured, Ken Buretta, \$4,055.58 in Personal Injury Protection (PIP) benefits under the terms of his policy after an automobile accident.

Safeco claimed that it had an equitable right to reimbursement for any payments “made to Mr. Buretta, on behalf of the Defendant, for damages resulting from the subject accident.”

The complaint also named Brian Russell, Buretta’s attorney, as an individual “Defendant,” but did not allege any specific claim or cause of action involving Russell. Russell filed an answer raising affirmative defenses and counterclaims and requested an award of attorney fees under CR 11, RCW 4.84.185, and the Consumer Protection Act (CPA).¹

After unsuccessful discussions about settling the dispute, Russell filed a motion to dismiss, contending that Safeco had not alleged any facts or legal claim in its complaint that would support the action against the insureds’ attorney. Russell also requested an award of attorney fees.

Following a hearing on October 20, 2008, the district court granted Russell’s motion and dismissed him from the action. The court found that Safeco’s claims against Russell were frivolous and advanced without reasonable cause and awarded attorney fees in the requested amount of \$5,600. At the hearing, which Safeco did not attend, the court indicated that it was basing its decision solely on the language of the complaint. Noting that Safeco had “filed a lot of stuff and declarations,” the court indicated it had not reviewed those materials because Safeco had not provided a working copy. The court characterized the complaint as “bad drafting” but expressed the view that “I don’t think it was intentional.”

The district court denied Safeco’s motion for reconsideration, but also denied

¹ Ch. 19.86 RCW.

Russell's request for an additional award of attorney fees. Safeco appealed the district court's ruling to superior court, and Russell cross-appealed the district court's refusal to award attorney fees after denying reconsideration.

On May 1, 2009, Safeco filed a notice of voluntary dismissal, and the superior court entered an order dismissing the appeal in its entirety under RALJ 10.2(c). The order of dismissal noted that Russell intended to file a motion for attorney fees and costs before the chief civil judge.

Russell filed the motion for attorney fees on July 9, 2009. The superior court denied the motion, concluding that:

Although attorney fees were awarded below, pursuant to findings under RCW 4.84.185, no such findings (regarding frivolousness) have been entered on RALJ appeal. Nor have findings been entered that the RALJ appeal violates CR 11. Absent such findings, there is no basis upon which to award attorney fees on appeal. And while Russell contends that his counterclaim is going forward (challenging denial of fees in conjunction with motion to reconsider), the docket doesn't so indicate. More importantly, until Russell prevails on his counterclaims, there is no basis upon which to grant such fees.

Appealability

Although not raised by the parties, we discuss initially the appealability of the challenged trial court ruling. Except in limited circumstances not present here, a superior court decision "entered after a proceeding to review a decision of a court of limited jurisdiction" is not appealable as a matter of right. RAP 2.2(c). Russell's motion for attorney fees was based solely on fees and costs incurred during the district court proceedings and the subsequent RALJ appeal. The superior court ruling denying Russell's motion was necessarily part of the RALJ appeal and subject only to

discretionary review. See RALJ 11.2. We therefore dismiss Russell's appeal.

Discretionary Review

Even if we treat Russell's notice of appeal as a notice for discretionary review, discretionary review is not warranted. See RAP 5.1(c) (notice of appeal from a decision that is not appealable will be given same effect as a notice for discretionary review). Discretionary review of a superior court decision in a RALJ proceeding will be accepted only:

- (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
- (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
- (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

The crux of Russell's argument is that because Safeco eventually dismissed both its RALJ appeal and the underlying action against Buretta,² the district court's determination that Safeco's complaint was frivolous and advanced without reasonable cause became the "law of the case." Russell claims that he was therefore entitled, as a matter of law, to all fees incurred in responding to Safeco's subsequent motion for reconsideration and to the RALJ appeal. But Russell cites no relevant authority to

² On June 26, 2009, Safeco and Buretta entered into a stipulated order of dismissal of the underlying lawsuit.

support this proposition.

The district court's finding of frivolousness and its award of attorney fees were based solely on the language of the complaint. At that point, as the court acknowledged, it had not reviewed Safeco's legal arguments explaining why it had designated Russell as a defendant. The district court considered some of those arguments when it denied reconsideration, but the court also denied Russell's motion for an additional award of fees. This determination clearly fell within the court's discretion. See Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (appellate court reviews decision under RCW 4.84.185 for an abuse of discretion). And as the superior court noted, Russell did not pursue his cross-appeal from the district court's denial of fees on reconsideration. Consequently, like the earlier ruling awarding fees, that decision also stands unchallenged.³

The district court's award of fees was not based on the arguments that Safeco later raised on reconsideration and in the RALJ appeal. Consequently, the court's finding that the complaint was frivolous does not establish that all of Safeco's subsequent filings and arguments were frivolous as a matter of law. Because there was no factual determination supporting an award of attorney fees for frivolousness in the RALJ proceeding, the superior court did not err in denying Russell's motion for an additional award of attorney fees.⁴

In summary, the superior court's ruling is not appealable as a matter of right

³ Although the superior court referred to Russell's "counterclaim," it is apparent from the context of the ruling that the court meant Russell's cross-appeal challenging the district court's denial of an additional award of fees on reconsideration.

⁴ Russell also alleges that he is entitled to an award of fees under the CPA, but he has not presented any legal argument in support of that claim.

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and does not satisfy any of the criteria for discretionary review under RAP 2.3(d). We therefore dismiss Russell's appeal.

Appeal dismissed.

Spencer, J.

WE CONCUR:

Schweiller, J. Becker, J.